

**U.S. Department of Justice
Antitrust Division**

ROUTING AND TRANSMITTAL SLIP

Date

August 16, 1996

TO: (Name, office symbol, room number,
building, Agency/Post)

Initials

Date

1. Anne K. Bingaman

2. Becky Dick

3.

	Action		File		Note and Return
XX	Approval		For Clearance		Per Conversation
	As Requested		For Correction		Prepare Reply
	Circulate		For Your Information		See Me
	Comment		Investigate		Signature
	Coordination		Justify		

REMARKS

Re: Recommendation to issue CID: Frito-Lay

TEA recommends issuing the attached CID to Frito-Lay, Inc., in our investigation of its exclusive shelf space arrangements with retailers. The staff has met with Frito-Lay's counsel, and the CID is focused on obtaining information and documents concerning its dominance in a small number of geographic markets around the country.

I recommend that you sign this CID.

**DO NOT use this form as a RECORD of approvals, concurrences, disposals,
clearances, and similar actions**

FROM: (Name, org. symbol, Agency/Post)

Becky Dick

Room No.-Bldg.

3208

Phone No.

United States Department of Justice

Antitrust Division
Washington, D.C. 20530

TO Frito-Lay, Inc.
7701 Legacy Drive
Plano, Texas 75024-4099

Civil Investigative

Demand No.

This civil investigative demand is issued pursuant to the Antitrust Civil Process Act, 15 U.S.C. §§1311-1314, in the course of an antitrust investigation to determine whether there is, has been, or may be a violation of Section 2 of the Sherman Act, 15 U.S.C. § 2

by conduct, activities or proposed action of the following nature: explicit or de facto
exclusive dealing arrangements and other exclusionary practices

You are required by this demand to produce all documentary material described in the attached that is in your possession, custody or control, and to make it available at your address indicated above for inspection and copying or reproduction by a custodian named below. You are also required to answer the interrogatories on the attached schedule. Each interrogatory must be answered separately and fully in writing, unless it is objected to, in which event the reasons for the objection must be stated in lieu of an answer. Such production of documents and answers to interrogatories shall occur on the 21st day of September, 19 96 at 5:00 a.m. p.m.

The production of documentary material and the interrogatory answers in response to this demand must be made under a sworn certificate, in the form printed on the reverse side of this demand, by the person to whom this demand is directed or, if not a natural person, by a person or persons having knowledge of the facts and circumstances relating to such production and/or responsible for answering each interrogatory.

For the purposes of this investigation, the following are designated as the custodian and deputy custodian(s) to whom the documentary material shall be made available and the interrogatory answers shall be submitted: Roger W. Fones, Custodian, Transportation, Energy & Agriculture
Department of Justice, 325 Seventh Street, N.W., Suite 500, Washington, D.C.
20530

Inquiries concerning compliance should be directed to Nina Hale 202-307-0892, or
Jill Ptacek 202-307-6607.

Your attention is directed to 18 U.S.C. §1505, printed in full on the reverse side of this demand, which makes obstruction of this investigation a criminal offense.

Issued at Washington, D.C., this _____ day of _____, 19 _____

Assistant Attorney General

FRITO-LAY, INC.

I. INSTRUCTIONS

1. Unless otherwise specified, the information and documents requested are information and documents in the possession, control or custody of your company that were prepared, written, sent, dated, received, or in effect at any time between January 1, 1991, and the date of your company's compliance with this civil investigative demand.

2. Preface each of your interrogatory answers with the text of the request to which that answer responds. Where an interrogatory includes subparagraphs (e.g., a., b., c.), state the information called for in each subparagraph separately.

3. In responding to any interrogatories or document requests that call for information or documents relating to "any person" or "each person" unless otherwise instructed, include documents or information relating to your company.

4. If you do not have sufficient information to answer an interrogatory fully, submit as complete an answer as possible and explain why the answer is incomplete.

For that part of your answer for which you lack information, submit:

a. your best estimate or judgment, so identified, and state the source or basis of the estimate or judgment;

b. all estimates or judgments previously made by your company, and set out the source or basis of such estimates or judgments, and where your

company has reason to believe that such estimates or judgments are not correct, an explanation of why such estimates or judgments are not correct; and

c. such information available to your company as comes closest to providing the information requested.

Where incomplete answers, or estimates or judgments are submitted, and you believe that other sources of more complete or accurate information exist, identify and describe those sources.

5. If any portion of any document is responsive to any document request, then the entire document must be produced. If the document contains privileged material, produce the entire document with the privileged material deleted.

6. Documents produced pursuant to this Schedule shall be arranged in the following manner:

a. Sort documents by the request to which they respond and place them in file folders or other enclosures bearing the name of your company, the name of the employee who had possession or control of the file from which the documents were produced, and the document request number to which the documents respond.

b. After the documents are arranged in order of the document request to which they respond, mark each page, in an ink other than black, with the letters "FL," and number each page consecutively. Such markings shall be in the lower right-hand corner of each page, but shall not obscure any information on the document. The pages shall be numbered consecutively so that the first page that

responds to the first document request receives the lowest page number (e.g., FL-00001), and the last page that responds to the final document request receives the highest number.

c. Documents that were originally stapled, clipped or otherwise fastened together shall be produced in such form.

7. For each document or part of a document withheld under a claim of privilege, submit a sworn or certified statement from counsel or an officer of your company:

a. identifying the withheld document by author, addressee, date, number of pages, subject matter, the paragraph of this Schedule to which the withheld information is responsive, and by any marks required by paragraph 1.6;

b. specifying the nature and basis of the claimed privilege; and

c. identifying each person to whom the withheld document was sent and each person to whom the withheld document or its contents, or any part thereof, was disclosed, and the date it was disclosed.

If no documents are withheld pursuant to a claim of privilege, so state. Any document or part of a document withheld under a claim of privilege must be preserved.

8. All documents currently existing in machine-readable form should be provided in that form, but not in a form that requires specialized or proprietary hardware or software. Data files should be in sequential format, also known as ASCII files or flat files, with the data fields in fixed-column positions. For each data file provided, the following information is needed: a record layout, a short narrative description of what

the file contains, the dates of the last revision, translation of any coded fields, the number of records in the file, and a printout of the first 100 records in report format. A record layout must contain the following pieces of information: name of the field, description of field, starting and ending position of the field, length of the field, starting and ending position in the record, length of the file, and characteristics of the field (i.e., packed decimal, zoned decimal, alphanumeric, etc.). Any data provided shall be accompanied by any directories or manuals used for interpreting or understanding the data.

The magnetic media should be 9-track tapes or PC diskettes of 5 1/4 or 3 1/2 inch. Data can be accepted in either ASCII or EBCDIC format. Do not convert the data between ASCII and EBCDIC formats. The 9-track tapes should be unlabeled. The record length, blocksize, and tape density must be provided. The tapes should be written with generic copy utilities rather than backup programs from a specific operating system. Where PC files are too large for one diskette, DOS BACKUP disk sets will be acceptable so long as they are accompanied by backup listings. Backup listings may be hard copy or ASCII files on non-backup diskettes. A backup listing must provide the pathname necessary to individually restore each file in the backup. Compression utilities are acceptable so long as the utility is provided and such provision does not violate licensing or copyright laws.

9. No agreement by the Department of Justice or its representatives purporting to modify, limit, or otherwise vary this civil investigative demand is binding on

the Department of Justice unless confirmed or acknowledged in writing, or made of record in open court, by a duly authorized representative thereof.

10. For further information, explanation, or definition, or to discuss an^{7778y} proposed modification of this Schedule, contact Nina Hale at 202-307-0892 or Jill Ptacek at 202-307-6607.

II. DEFINITIONS

1. "Agreement" means a contract, arrangement, or understanding, formal or informal, oral or written, between two or more persons.

2. "Brand name" means the trade name under which any relevant product is sold.

3. "Describe" means to provide a comprehensive, complete, accurate, and detailed description, explanation, or listing of the matter inquired of.

4. "Discuss" means analyze, constitute, summarize, report on, consider, recommend, set forth, or describe a subject, regardless of the length of the discussion. Documents that merely mention or refer to a subject without further elaboration do not discuss that subject. Documents that discuss a particular subject include all documents that contain reports, studies, forecasts, analyses, plans, proposals, evaluation, recommendations, directives, procedures, policies, guidelines or any other comments that address or concern the subject.

5. "Document" means any written, recorded, or graphic material, whether prepared by you or by any other person, that is in your possession, custody, or control,

including memoranda, reports, letters, telegrams, electronic mail, other electronic correspondence, and any other communications recorded in any form or medium; notes, minutes, and transcripts of conferences, meetings, and telephone or other communications; contracts and other agreements; statements, ledgers, and other records of financial matters or commercial transactions; notebooks and diaries; diagrams, graphs, charts, and other drawings; plans and specifications; publications; photographs; photocopies, microfilm, and other copies or reproductions; audio and video recordings; tape, disk (including all forms of magnetic, magneto-optical, and optical disks), and other electronic recordings; financial models, statistical models, and other data compilations; and computer printouts. The term includes all drafts, whether or not a draft led to the creation of a final document, and all copies that differ in any way from the original (including as to any notations, underlinings, or other markings). The term also includes information stored in, or accessible through, computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations.

6. "Identify" or "identity" means to state or a statement of:
 - a. in the case of natural person, his or her name, title or position, last known home and business addresses and telephone numbers, and dates of employment; and
 - b. in the case of a person other than a natural person, its name, the address and telephone number of its principal place of business;

c. in the case of a facility, its owner, its commercial name, its address, and the city and state in which it is located.

7. "Or" means and/or.

8. "Person" means any natural person, corporation, firm, company, sole proprietorship, partnership, joint venture, association, institute, or other business, governmental, or legal entity.

9. "Plans" mean tentative and preliminary proposals, recommendations, or considerations, whether or not finalized or authorized, as well as those that have been adopted.

10. "Relate to" means discuss, describe, refer to, reflect, contain, analyze, study, report on, comment on, evidence, constitute, set forth, consider, recommend, concern, or pertain to, in whole or in part.

11. "Relevant product" means:

- a. potato chips;
- b. tortilla chips;
- c. corn chips;
- d. pretzels;
- e. extruded products; and
- g. popped corn.

12. "Sales" means net sales, i.e., total sales after deducting discounts, returns, allowances and excise taxes. "Sales" includes sales of the relevant products whether

manufactured by the company itself or purchased from sources outside the company and resold by the company in the same manufactured form as purchased.

13. "Shelf space" means any area of display space in a retail outlet, whether permanent or temporary, including space on gondolas, end-caps, front end merchandisers, bread tables, or stand-alone display racks.

14. "You" or "your company" means Frito-Lay, Inc. and each of its predecessors, successors, divisions, subsidiaries, and affiliates, each person directly or indirectly, wholly or in part, owned or controlled by it, or which owns or controls it, and each partnership or venture to which any of them is a party, and all former and present directors, officers, employees, agents, consultants, or other persons acting for or on behalf of any of them.

15. The singular form of a noun or pronoun shall be considered to include within its meaning the plural form of the noun or pronoun, and vice versa.

III. INTERROGATORIES

1. Identify each person employed by your company whose primary responsibilities include the promotion, marketing or sale of any relevant product through or to retail outlets, and separately for each such person, state the dates of service in each position held and termination date, if any.

2. Identify each person at your company with responsibility for formulating or approving any of your company's policies or practices for:

a. competing on price for any relevant product;

- b. offering discounts, rebates, or up-front payments to retail outlets;
 - c. offering payments to retail outlets for shelf space;
 - d. offering payments to retail outlets for promotional support, including payments for advertising support;
 - e. seeking sole supplier relationships with retail outlets for the sale of any relevant product or any unit size of any relevant product;
 - f. seeking exclusive promotion of any relevant product by any retail outlets.
3. List each relevant product manufactured or sold by your company, and separately for each product listed:
- a. state the brand name of the product;
 - b. state the corresponding SKUs for the product by name and number.
4. Separately for each product listed in response to Interrogatory 3, and separately for each year, state your company's total sales to all retail outlets in the United States, in units and dollars.
5. Describe each type of retail channel through which your company sells any relevant product, including supermarkets, convenience stores, mass merchandise and warehouse clubs, and vending machines.
6. Separately for each of your 22 sales areas, state for each type of retail channel described in response to Interrogatory 5:
- a. the total sales of the relevant products by that channel;

b. total sales by your company of the relevant products through that channel; and

c. the percentage of your company's total sales sold through that retail channel.

7. Separately for each sales area of your company, identify for each relevant product the persons with whom you compete for the sale of that product, and for each person so identified, state the brand name of its product.

8. Separately for each sales area of your company, identify for each relevant product under each brand name the persons at your company with responsibility for determining the wholesale or retail price of that product.

9. Identify each of your manufacturing facilities that provides, or will provide any time in the next two years, any relevant product to any person in the United States, and separately for each such facility, state:

a. each relevant product and the product's brand name produced by the facility; and

b. each relevant product that your company currently is not producing at the facility, but which the facility is capable of producing.

10. Separately for each facility identified in response to Interrogatory 9, state the states and counties contained in the facility's service area for any relevant product.

11. Separately for each facility identified in response to Interrogatory 9, state:

a. the location of each distribution center or drop box served by that facility;

- b. the total number of routes served by that facility;
- c. the farthest geographic distance any relevant product is transported from the facility to any customer, and the volume and revenue generated by that customer for that facility;
- d. separately the percentage of total sales of the relevant products sold within a 100 mile radius, a 150 mile radius, a 200 mile radius, and greater than a 200 mile radius of the facility;
- e. in miles, the farthest geographic distance your company would ship any relevant product from that facility, and describe each factor that would limit shipments of greater distances, including any cost or quality concerns.

12. For each of the relevant products produced by your company, separately state and quantify each cost of operating your distribution system for those products, including fixed costs (fixed for at least one year) or variable costs.

13. Separately for each retail channel identified in response to Interrogatory 5, identify the top 10 retail outlets, as measured by dollar purchases of relevant products from your company, in each of the following sales areas:

- a. Northern California;
- b. Southern California;
- c. San Antonio;
- d. Dallas;
- e. Houston; and
- f. Chicago.

14. Separately for each retail outlet identified in response to Interrogatory 13, state:

a. separately for each year, the total dollar volume of sales of the relevant products by your company to that outlet;

b. separately for each year, your company's expenditures for each of the following:

(1) promotional allowances,

(2) flex funds,

(3) shelf space,

(4) growth programs, and

(5) any other expenditures related to the promotion or sale of any relevant product;

c. separately for each year, state the percentage of the total shelf space designated by that retail outlet for display of the relevant products that is occupied by your company's products;

d. identify each person at your company with responsibility for formulating, proposing, recommending, establishing, implementing, or approving each price, price increase, price decrease, promotion or discount to that retail outlet; and

e. identify your contact person at that retail outlet.

15. For each sales area listed in Interrogatory 13, separately identify each retail outlet for whom your company is the sole supplier (excluding any private label brands) of any relevant product(s), and state the product for which you are the sole supplier.

16. For each sales area listed in Interrogatory 13, identify each retail outlet where your company has lost shelf space to competitors and identify the competitors to which you have lost space.

17. Identify each person that has entered or attempted to enter, or exited from, the manufacture of any of the relevant products which your company also manufactures. For each person so identified, state:

a. the relevant product it manufactures or manufactured, including the brand name of each product; and

b. the geographic area(s) in which its product(s) are or were sold;

c. the dates it entered and exited the market.

18. Identify the person at your company most knowledgeable about your company's electronic data storage and retrieval practices.

19. Identify the person(s) responsible for preparing the response to this civil investigative demand and submit a copy of all instructions prepared relating to the steps to be taken to respond to this CID. Where oral instructions were given, identify the person who gave the instructions and describe the content of the instructions and the person(s) to whom the instructions were given. For each interrogatory and document request, identify each person who participated or assisted in the preparation of the

response and list each office and person (identified by name and corporate title or job description) whose files were responding to that item.

DOCUMENT REQUESTS

1. Sufficient documents (e.g., organizational charts) to disclose your company's corporate organization in the United States.
2. Reference is made to each business unit of your company that at any time since January 1, 1991 was or is responsible for the sale or marketing of any relevant product, and to each business unit of which it is or has been a part, or to which it has reported. All documents that constitute or contain for any such units any:
 - a. business or marketing plans, long-range plans, strategic plans, expansion plans, or annual reviews (e.g., one or five year marketing plans or reviews);
 - b. operating, capital, or financial budgets, reports, statements or plans;and
 - c. forecasts or projections of sales, costs, earnings, or profitability.
3. All documents relating to the marketing or sale of any relevant product, including, but not limited to, market studies, forecasts and surveys, and all other documents relating to:
 - a. the market share or competitive position of your company or any of its competitors;

b. the relative strengths or weakness of companies selling any relevant product; and

c. allegations by any person that your company is not behaving in a competitive manner, including, but not limited to, retail outlet and competitor complaints, threatened, pending or completed lawsuits, and federal and state investigations.

4. All documents relating to your company's, or any other person's, price lists, suggested retail prices, pricing plans, pricing policies, pricing forecasts, pricing strategies, pricing analyses, and pricing decisions relating to any relating to any relevant product.

5. All documents, in machine readable form, provided to or purchased from Nielsen, IRI or any other market research person relating to any relevant product, including weekly data for each SKU, as well as all documents necessary for the decoding or interpretation of such data.

6. All documents that describe or discuss:

- a. competing on price for any relevant product;
- b. offering discounts, rebates, or up-front payments to retail outlets;
- c. offering payments to retail outlets for shelf space;
- d. offering payments to retail outlets for promotional support, including payments for advertising support;
- e. seeking sole supplier relationships with retail outlets for the sale of any relevant product or any unit size of any relevant product;

f. seeking exclusive promotion on any relevant product by any retail outlet.

7. All documents relating to any agreements pursuant to which your company provides, sells, promotes, or markets any relevant product to any retail outlet identified in response to Interrogatory 13, including any proposals, analyses, discussions, negotiations, correspondence, contracts, or record of any payments to that outlet, but excluding sales invoices.

8. All documents relating to competition between any relevant product and any other product.

9. All documents relating to the significance or effect of brand name or brand reputation on the promotion, sale or marketing of any relevant product.

10. Each study, survey, analysis, or history of prices in the United States or any region thereof of any relevant product, including any industry data compiled by any person including A.C. Nielsen or Information Resources Inc.

11. All documents relating to the exit or entry of any person into or from the sale of any relevant product, including entry of any person by adding additional capacity or facilities or by expanding the distribution area of its products, or exit of any person by reducing capacity or contracting its distribution area.

12. All documents that discuss (1) the market share of any retail outlet that sells any relevant product or (2) the markets in which those outlets compete.

13. All documents relating to any discussions or agreements with Proctor & Gamble regarding your, or any other person's, use of or access to Olestra.

14. All documents relating to any civil action in which your company has been a party relating to any relevant product and involving allegations or claims under federal or state antitrust laws, including Jays Foods, Inc. v. Frito-Lay, Inc., No. 78 C 4352 (N.D. Illinois).

15. Documents sufficient to show, and to the extent not reflected in such documents, describe in detail, your company's policies and procedures relating to the retention and destruction of documents.